

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BANK OF AMERICA.

**Plaintiff.**

V.

TRAVELERS INDEMNITY COMPANY,  
*et al.*,

### Defendants.

No. C07-0322RSL

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

This matter comes before the Court on “Plaintiff’s Motion for Summary Judgment re: Duty to Defend.” Dkt. # 20. Plaintiff seeks a declaration that defendant Travelers Casualty and Surety Company owed a duty to defend Bank of America in an environmental contamination suit. Travelers argues that the pollution exclusion in its policy excludes coverage for the underlying litigation and that Bank of America may have breached the policy by impairing Traveler’s contribution and/or subrogation rights against other insurers.

Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

#### A. Underlying Litigation

In determining whether Travelers had a duty to defend under Policy No. 01GL10053SCA, the Court primarily considers the allegations of the complaint in the

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underlying litigation. The duty of an insurer to defend an action brought against its insured arises when the complaint alleges facts which could, if proven, impose liability upon the insured that falls within the policy's coverage provisions. E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 908 (1986); McMahan & Baker, Inc. v. Continental Casualty Company (CNA), 68 Wn. App. 573, 580 (1993). The complaint must be liberally construed and the insurer must defend, consistent with the policy provisions, if the claim is potentially within the policy's coverage. Bosley v. American Motorists Ins. Co., 66 Wn. App. 698, 701 (1992).

In 2004, Safeway, Inc., the owner of a property at the base of Queen Anne Hill, sued Bank of America after discovering that Safeway's property was contaminated with petroleum hydrocarbons. Bank of America was sued in its role as trustee of the Donald C. and Mary Clare Jurgensen Trust. The primary asset of the Trust is a property adjoining the Queen Anne Safeway site. In the underlying litigation, Safeway alleged that the trust property was a source of the environmental contamination in the area – it had been used as a laundry, dry cleaners, and dye facility between 1918 and the 1950s – and that Bank of America was liable as “a trustee for its ownership interest in the 523 Queen Anne Avenue property . . . .” Safeway, Inc. v. ChevronTexaco Corp., No. 04-2-33585-0 SEA (King County Superior Court) (Complaint at ¶ 4.33).

## **B. Pollution Exclusion**

Although the comprehensive general liability policy at issue in this case generally covers liabilities arising from property damage, the policy contains a pollution exclusion upon which Travelers relied when it denied coverage. Pursuant to the exclusion, coverage does not exist for:

1. . . [B]odily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release, escape or contamination by pollutants:

1                             (A) at or from premises owned by, rented to, or occupied by the insured  
2                             . . .

3                         2. Any loss, cost or expense arising out of any governmental direction or  
4                             request imposed upon the insured to test for, monitor, clean up, remove,  
5                             contain, threat, detoxify or neutralize pollutants, or for the preparation of  
any plan relating to any of the foregoing activities.

6 Policy No. 01GL10053SCA, Special Endorsement No. 18. Defendants argue that coverage is  
7 precluded under paragraph 1(A) of the pollution exclusion and that paragraph 2 was triggered by  
8 an April 2004 letter from the Washington Department of Ecology to Bank of America.

9                         Under the law of Washington, insurance policies are contracts and must be  
10 construed as such.

11                         An insurance policy is construed as a whole, with the policy being given a fair,  
12 reasonable, and sensible construction as would be given to the contract by the  
13 average person purchasing insurance. If the language is clear and unambiguous,  
14 the court must enforce it as written and may not modify it or create ambiguity  
15 where none exists. If the clause is ambiguous, however, extrinsic evidence of  
16 intent of the parties may be relied upon to resolve the ambiguity. Any ambiguities  
17 remaining after examining applicable extrinsic evidence are resolved against the  
drafter-insurer and in favor of the insured. A clause is ambiguous when, on its  
face, it is fairly susceptible to two different interpretations, both of which are  
reasonable.

18                         Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665-66 (2000) (internal  
19 quotation marks and citations omitted). Plaintiff argues that the pollution exclusion is  
20 ambiguous in that the terms “premises” and “owned by” are susceptible to more than one  
21 interpretation and because the exclusion does not specify when the property had to be owned by  
22 the insured. Because the Court finds that the phrase “owned by” is ambiguous and must be  
23 interpreted against the insurer, it need not decide the “premises” and timing arguments raised by  
24 plaintiff.

1           **1. Paragraph 1(A): “Owned By”**

2           Paragraph 1(A) of the pollution exclusion excludes from coverage environmental  
3 contamination at or from property “owned by” the insured. Whether property held in trust is  
4 “owned by” the trustee is the issue in this case. It is undisputed that Bank of America holds title  
5 to the property adjoining the Queen Anne Safeway site: Mary C. Jurgenson transferred the  
6 property by quit claim deed to Bank of America’s predecessor, Rainier National Bank, on May  
7 14, 1980. Defendants point out that, under Washington law and the terms of the trust, the  
8 trustee has the authority to manage and convey the trust property in the same manner and to the  
9 same extent as the trustors. Defendants also argue that the parties must have intended “owned  
10 by” to include trust properties because the policy was issued to “a trust department that will only  
11 own property in trust.” Opposition at 4. Any interpretation of “owned by” that excludes trust  
12 properties would, according to defendants, gut the pollution exclusion because it would not  
13 apply to any of the properties held by Rainier National Bank.

14           The Court is not persuaded. In Washington, title and ownership are not  
15 necessarily the same thing. In attempting to identify the owner of property, the average person  
16 would not consider only the possession of legal title, but also the nature of the transaction, the  
17 intent of the parties, and any other relevant indicia of ownership (such as possession and right to  
18 control). See Gingrich v. Unigard Sec. Ins. Co., 57 Wn. App. 424, 430-31 (1990). Depending  
19 on the facts of a particular case, the term “owner” could be the person that holds legal title or the  
20 person that has a right to title. See, e.g., Webster’s Third New International Dictionary 1612  
21 (1981) (defining “owner” as “one that owns: one that has the legal or rightful title whether the  
22 possessor or not: proprietor”). Because Rainier National Bank took legal title to the property as  
23 part of a trust agreement, the property and any income derived therefrom were to be utilized for  
24 the benefit of the trustors, not Rainier National Bank. When the trustors die, the trust properties  
25 are to be distributed to their designated heirs: plaintiff has no long-term interest in the trust

1 estate. This separation of legal and beneficial ownership is common in trust arrangements. In  
2 fact, the Restatement (Third) of Trusts §2 cmt. d distinguishes between “owner,” which is used  
3 to describe a person holding an interest for his own benefit, and “title,” the possession of which  
4 may or may not confer any of the benefits of ownership.

5 Defendants argue that a construction of the phrase “owned by” that excludes trust  
6 properties is not “fair, reasonable, or sensible” because it would vitiate the pollution exclusion.  
7 This argument is factually unsupported and overstates the impact of the Court’s interpretation.  
8 The policy at issue was written for Rainier National Bank, not just its trust department. Absent  
9 some evidence to the contrary, one must assume that the Bank held title to one or more  
10 properties (such as its branch offices or foreclosed premises) for its own benefit. Under the  
11 Court’s interpretation, the pollution exclusion would preclude coverage for liabilities arising out  
12 of environmental contamination at these properties because they were actually “owned by” the  
13 insured. Thus, neither the text of the policy nor the context in which it was written compel an  
14 interpretation of “owned by” that would include trust properties.

15 For all of the foregoing reasons, the meaning of “owned by” as used in the  
16 pollution exclusion is ambiguous where the insured property is held in trust. Construing the  
17 phrase in favor of the insured results in a finding that the trust property is not “owned by” Bank  
18 of America and, therefore, that paragraph 1(A) of the pollution exclusion does not apply.

19 **2. Paragraph 2: Government Request**

20 Defendants cite to an April 16, 2004, letter to Bank of America from the  
21 Department of Ecology in support of their argument that paragraph 2 of the pollution exclusion  
22 precludes coverage. This argument fails for two reasons. First, the letter does not contain “any  
23 governmental direction or request imposed upon the insured.” The letter simply provides notice  
24 that the Department of Ecology is interested in the site and that if Bank of America were to  
25 undertake any investigative or cleanup activities, it should carefully document its efforts.

1 Second, the costs plaintiff seeks to recover were incurred in defending a suit initiated by  
2 Safeway, Inc., not the government. A simultaneous or subsequent request for action from the  
3 Department of Ecology (or the United States Environmental Protection Agency) cannot convert  
4 these defense costs into a “loss . . . arising out of any governmental direction or request imposed  
5 upon the insured.” The Court therefore finds that paragraph 2 does not apply and that no  
6 additional discovery is necessary to resolve this argument. Defendants’ request for additional  
7 time pursuant to Fed. R. Civ. P. 56(f) is denied.

8           **B. Impairment of Contribution and/or Subrogation Rights**

9           Plaintiff seeks a declaration that Travelers had a duty to defend the underlying  
10 litigation. Where the facts alleged in the underlying complaint have the potential to trigger  
11 coverage, the duty to defend applies. While the Court is willing to acknowledge that there may  
12 be instances in which the insured’s abject failure to comply with a procedural requirement of the  
13 contract (such as the duty to provide documents or the duty to give timely notice) may justify a  
14 refusal to defend, this is not such a case. Whether plaintiff has compromised defendants’  
15 subrogation and/or contribution rights is not clear today, much less at the time Bank of America  
16 gave notice of the underlying litigation. Defendants offer no authority for their argument that an  
17 insurer may refuse to defend because the insured might have breached a procedural requirement  
18 in the policy. Such a hypothetical injury cannot justify a refusal to defend, even if it may  
19 ultimately result in a finding that plaintiff has waived its right to coverage.

20  
21           For all of the foregoing reasons, the Court finds that Travelers Casualty and Surety  
22 Company had a duty to defend Bank of America in the underlying environmental contamination  
23 suit. Plaintiff’s motion for partial summary judgment regarding the duty to defend is therefore  
24 GRANTED.

1 Dated this 22nd day of January, 2008.  
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Robert S. Lasnik

Robert S. Lasnik  
United States District Judge